IN THE

Supreme Court of the United States

October Term, 1967

No. 508

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

v.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M. D. and A. B. C. INSURANCE COMPANIES.

On Appeal from the Supreme Court of Louisiana

BRIEF OF THE EXECUTIVE COUNCIL OF THE EPISCOPAL CHURCH IN THE U. S. A. AND THE AMERICAN JEWISH CONGRESS, *AMICI CURIAE*

LEO PFEFFER
Attorney for Executive Council of the Episcopal Church in the U. S. A., Amicus Curiae
191 Willoughby Street
Brooklyn, N.Y. 11201

HOWARD M. SQUADRON
JOSEPH B. ROBISON
Attorneys for American Jewish Congress, Amicus Curiae
15 East 84th Street
New York, New York 10028

LEO PFEFFER
LESTER GREENBERG
Of Counsel

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This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

This is a suit brought in behalf of five infant children of the decedent, a female domestic, who allegedly died by reason of the negligence of the defendant physician and the Charity Hospital of Louisiana at New Orleans. The action was brought under Louisiana Civil Code Article 2315,

which allows an action to be brought by children to recover for the wrongful death of their parent and declares that this right of action constitutes a "property right." The Louisiana courts held, however, that the term "child or children" as used in the statute contemplates only legitimate children and that, since the decedent's children were admittedly illegitimate and had never been legitimated, they could not sue under the statute.

Interest of the *Amici*

The Executive Council of the Episcopal Church in the United States of America is the administrative organ of the Protestant Episcopal Church in the United States of America. It is also the policy-making organ of the Church between the triennial sessions of the Episcopal Church's General Convention. In this double capacity the Executive Council represents 89 continental dioceses and 3,500,000 communicants. Its President is the Presiding Bishop of the Episcopal Church in the U.S.A.

The Department of Christian Social Relations which is a part of the Executive Council and is, in this instance, acting for the Executive Council, is charged with supervision of community services, citizenship programs, pastoral services and material and programs at home and overseas. It is charged with representing the Church in public action which will assure the dignity of persons and assist communities to collaborate in the task of protecting the rights of citizens and the achievement of a society of justice.

The American Jewish Congress is a national organization of American Jews formed in part to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are convinced that the surest way to preserve our nation and our democracy is to guard jealously the liberties secured by our Constitution and Bill of Rights and to oppose any infringements upon those liberties not clearly necessitated by overriding interests.

Each of these organizations has become increasingly concerned with the deepening gulf between the great majority of Americans who enjoy the benefits of our unparalleled affluence and the minority who have been denied the opportunity to share in our abundance. That gap is in many ways deepened by legislation based on outmoded concepts of caste and status, exemplified by the Louisiana statute here challenged. We believe that the discrimination embodied in that statute is unacceptable and unconstitutional for much the same reasons that this Court has condemned discrimination based on race and other accidents of birth. We believe further that legislation of this kind stands in the way of dealing with the pressing problem of poverty in the midst of plenty in a manner consistent with the principles of our democratic system.

The Question Presented

The question presented on this appeal is whether a state may, consistently with the Fourteenth Amendment, exclude children born to an unmarried mother from the benefits of a statute permitting children generally to sue for the wrongful death of their mother.

Summary of Argument

Exclusion of children born illegitimately from the benefits of a wrongful death statute deprives them of their property without due process of law since it is arbitrary and bears no rational relationship to any end which the state may lawfully pursue. It similarly deprives them of their liberty, a term which should be construed to include the right to be considered a full and equal member of the community, because it imposes cruel punishment upon persons who have committed no crime. Such exclusion deprives the children of the equal protection of the laws since the classification of the statute is arbitrary and irrational and not merely perpetuates but reinforces invidious distinctions and a badge of inferiority.

ARGUMENT

POINT I

Exclusion of children of an unmarried mother from the benefits of a wrongful death statute deprives them of their property and liberty without due process of law.

A. Due Process and Equal Protection

Preliminarily, we note that, although this Court pointed out in *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954) that "equal protection" and "due process" are not necessarily interchangeable since the former is a "more explicit safeguard of prohibited unfairness," nevertheless discrimination may be "so unjustifiable as to be violative of due process." See also, *Schneider* v. *Rusk,* 377 U. S. 163, 168 (1964). In the present case, the discrimination clearly falls within that categorization. Hence, what we assert in Point I is in large measure applicable to our second Point and vice versa. However, for the sake of convenience we present our views separately under "due process" and "equal protection."

B. Deprivation of Property

In view of the universality of death actions among the states today, it may well be argued that, even though the common law did not recognize such suits, modern standards of law and justice create a property right in dependent children to recover damages against one who has wrongfully caused the death of their parent. In the present case, we need not go that far. The statute under which the present

suit has been brought is framed in language which indicates clearly that its purpose is to make the right to sue for personal injuries a property right which survives the death of the injured person and to extend this property right to encompass injuries which result in his death. In the present case, if the injuries caused the children's mother had not been fatal but she had died before instituting suit, the statute states expressly that her right of action would be a property right which her children could pursue. Exclusion of non-legitimate children from bringing (or continuing) such an action would clearly be depriving them of a property right. The statute declares that fatal injuries shall be deemed the same as non-fatal ones and that the right of action for causing death shall be deemed a property right to the same extent as one causing non-fatal injuries. Hence, exclusion of children of an unwed mother from the right to sue for her death is likewise a deprivation of a property right.

We submit that the deprivation is without due process of law in violation of the Fourteenth Amendment. We recognize that this Court will be extremely reluctant to strike down a state statute as violative of due process where only property rights are involved. It will not sit as a "super-legislature to weigh the wisdom of legislation." *Ferguson* v. *Skrupa,* 372 U. S. 726, 731 (1963). But the frame of reference of that decision is indicated by the illustrations given by the Court of legislation which had in earlier times been set aside as violative of due process—"laws prescribing maximum hours for work in bakeries * * *, outlawing 'yellow dog' contracts, * * * setting minimum wages for women * * * and fixing the weight of loaves of bread * * *"

(372 U. S. at 729, citations omitted). It is indicated, too, by the statement in *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955) that "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

This is clearly not the type of legislation—or judicial interpretation of legislation—involved in the present suit. The legislation here in issue is aimed not at the regulation of "business or industrial conditions" but at the right of children to sue for the wrongful death of their parent. There is no indication that the Court intended *Ferguson* v. *Skrupa* to read the word "property" out of the Fifth and Fourteenth Amendments. (Cf. *Treichler* v. *Wisconsin*, 338 U. S. 251 (1949). It was held in *Barron* v. *Baltimore*, 7 Pet. 243 (1833) that nothing in the Fifth Amendment forbids a state from taking private property without just compensation, but the decisions of the Court after the adoption of the Fourteenth Amendment consistently forbid such action as a deprivation of property without due process of law. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 573 (1898); *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594 (1962).

It may be conceded that, where property rights alone are involved, the courts will accord a great degree of latitude to the legislature in the exercise of its judgment as to the best way to deal with the situation which calls for legislative intervention. But this does not mean that the

courts will abandon their judicial responsibility of effectuating the mandate of the due process clause. There may be a strong presumption of constitutionality favoring legislation affecting property rights, but the presumption is not irrebuttable. Legislation may be so arbitrary and so wanting in a rational relationship to a lawful legislative end as to require judicial intervention.

We submit that, for reasons shortly to be indicated, that is the situation in the present case. But we go further and suggest that the usual strong presumption of constitutionality is not applicable to the statute involved here. The famous Footnote 4 in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151 (1938), is not limited to First Amendment freedoms. It specifically suggests that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

While the "minorities" principally contemplated in *Carolene Products* may well have been racial and religious groups, the decisions cited in support of the proposition were not limited to these groups. (The Court cited, *inter alia*, *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) and *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177 (1938), neither of which involved a racial or religious minority.) Children of unwed parents, as we will shortly indicate, are a discrete and insular minority against whom prejudice exists sufficiently serious to curtail the operation of the ordinary political processes for the protection of minorities.

It follows from this that the rights asserted by the children in the present case are entitled to that more exacting judicial protection which is accorded to First Amendment rights. Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. But for legislation abridging the rights of a "discrete and insular minority", a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama,* 310 U. S. 88, 95-96 (1940).

Whether measured by the "more exacting scrutiny" test imposed by *United States* v. *Carolene Products, supra,* or by the usual standard applicable to laws alleged to deprive persons of property without due process of law, the present statute, we submit, cannot stand. The test to be applied was expressed in *Goldblatt* v. *Town of Hempstead, supra,* 369 U. S. at 594-5 (quoting *Lawton* v. *Steele,* 152 U. S. 133, 137 (1894)):

> "To justify the state in interposing its authority in behalf of the public, it must appear—First, that the

> interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The interests of the public do not require the exclusion of children of unwed mothers from the benefits of the Louisiana wrongful death action statute; such exclusion is not reasonably necessary for the accomplishment of a valid legislative purpose; and it is in fact unduly oppressive upon individuals.

(1) The public interest

There is no legislative history to shed light on the public interest which the Louisiana Court of Appeal held to require exclusion of illegitimate children from the state's wrongful death statute. All we have is the cryptic, unsupported statement that "it discourages bringing children into the world out of wedlock." We believe that, where the constitutional rights of so "discrete and insular" a minority as illegitimate infants are at stake, this Court is not bound by such a statement and may look into the reality of the situation. (This Court had no hesitation in identifying Negro exclusion as the true though unexpressed purpose of the "grandfather clause" invalidiated in *Guinn* v. *United States,* 238 U. S. 347, 365 (1915) and the city redistricting invalidated in *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).) This is particularly so where the sanction and the public purpose it purports to serve are so remote as to invite suspicious judicial scrutiny.

The reality behind the Louisiana statute—or the court's interpretation of it—is that it reflects the ancient shame

and obloquy suffered by children of unwed mothers. "The bastard," as one sociologist put it, "like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured." Davis, *Illegitimacy and the Social Structure,* 5 Am. J. of Sociology 215 (1939). The status of illegitimate children at common law has been vividly described as follows:

> The illegitimate child was legally isolated from his parents, for the common law from the Middle Ages recognized no legal relationship between him and his mother, much less between him and his father. The child was *filius nullius,* or *filius populi,* or *here nullius.* He was kin to no one. Since he was not even considered the lawful child of his mother, he could not inherit from her. He could not inherit real property from his own issue. He had no heirs but those of his own body. If he died without lawful issue, any real or personal property he possessed escheated to the crown. He was disqualified from becoming a member of trade guilds. He could not take holy orders without special dispensation. Legally, he was turned adrift. Until the enactment of the poor laws nobody or no unit of government was responsible for him. * * * Clarke, *Social Legislation,* 344 (1957).[1]

Shakespeare recognized that illegitimate children were part of the same type of "discrete and insular minority" as were Jews. With the same eloquence with which, in the famous "Hath not a Jew eyes?" speech in *The Merchant of Venice,* he protested the inequality suffered by Jews, he

1. Cf. *Deuteronomy* 23:2: "A bastard shall not enter into the congregation of the Lord; even unto his tenth generation shall he not enter into the congregation of the Lord."

protested in *King Lear* (Act I, Sc. 2) the inequality suffered by persons born out of wedlock:

> Why bastard, Wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue, Why brand they us With base? with baseness? bastardy? base, base?

Other groups, such as Jehovah's Witnesses, have been such "discrete and insular" minorities for whose protection the Bill of Rights was written.[2] But today the "discrete and insular" minority most cruelly suffering from the same type of social prejudice and discrimination visited upon illegitimates, Jews and Jehovah's Witnesses, are the Negroes. The word "nigger" has vulgarly become a term of obloquy as has in more polite society the word "black." The word "bastard" has similarly become a term of obloquy, and significantly the term "black bastard" has vulgarly come to characterize the depth of obloquy. (Florida law provides that the child of an attempted marriage between white and Negro "shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance." Fla. *Stat. Ann.* §741.11 (1964).)

In *Plessy* v. *Ferguson,* 163 U. S. 537 (1896) the Court denied any responsibility on its part or on the part of any other agency of government for this type of social prejudice or for correcting or ameliorating it. "Legislation," the Court said (at pp. 551-2) "is powerless to eradicate racial

2. "* * * They [Jehovah's Witnesses] have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes." *Prince* v. *Massachusetts,* 321 U. S. 158, 176, *dissent* (1944).

instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. * * * If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

Plessy was faulty even in its own frame of reference, for it implied that government and law had no part in the creation of the social inferiority of the Negro, whereas it was the lawful and law-protected institution of slavery which was the source of the social inferiority of the Negro. Similarly, it was the law-imposed nothingness (*"filius nullius"*) of the illegitimate child that was the source of his social inferiority.

But even if the *laissez-faire* approach of *Plessy* were valid in respect to affirmative obligation of government to correct or ameliorate social prejudice, *Brown* v. *Board of Education,* 347 U. S. 483 (1954) makes it quite clear that the Fifth and Fourteenth Amendments forbid government to preserve or reinforce it by giving it the affirmative sanction of law. This, we submit, is what the Louisiana law here in issue does; it gives affirmative sanction of law to the social inferiority of children born out of wedlock by excluding them from the company of those who, by reason of being born in wedlock, possess the right to sue for the wrongful death of their parents.

Indeed, the present law goes further than that upheld in *Plessy.* The situations would be analogous if illegitimate children were simply separated from those born in wedlock, but not otherwise deprived of legal rights. Suppose, for example, the State of Louisiana established a separate

public school system for children born out of wedlock. It is hard to believe that this Court, after *Brown* v. *Board of Education*, would uphold the constitutionality of such a law. How more unlikely would it be for this Court to uphold a law barring children born out of wedlock from the benefits of all public education. Is that not exactly the situation in the present case, and is it any more an adequate reply in the present case to assert, as the Louisiana court did, that an "action for wrongful death is purely statutory" than it would be in the former case to assert that the right to public education is purely statutory? *Cf. Torcaso* v. *Watkins*, 367 U. S. 488, 495-496 (1961).

(2) The necessity of the means

Assuming the validity of the purpose asserted by the Louisiana Court of Appeal—the discouragement of bringing children into the world out of wedlock—the means adopted by Louisiana are not, we submit, necessary for the effectuation of that purpose.[3] It seems beyond the bounds of rationality to assume that depriving children of the right to sue for the wrongful death of their mother can be an effective deterrent of non-marital intercourse. The shortest

3. Since the decedent in this case was the mother rather than the father of the children, the Louisiana court did not assert the doubtfulness of paternity and the concomitant possibility of fraud upon the defendant and his insurer as a justification of the exclusionary application of the state's wrongful death statute. Hence, this Court is not faced with the need of deciding whether exclusion would be constitutionally justified if the decedent were a male. We submit, however, that the result should not be different. The common law presumption of the legitimacy of children born to a married woman is an implicit recognition of the difficulty of proving the paternity of children born in wedlock. Statutory paternity proceedings, on the other hand, are a recognition that proof of paternity is a manageable task for courts, made even more manageable by the development and improvement of scientific means of identifying paternity.

way with fornicators would seem to be to put them in jail or perhaps to compel them to wear the letter "A" as in Hawthorne's *Scarlet Letter.* It is at the very least highly unlikely that any woman about to engage in non-marital intercourse would be thinking of her own wrongful death, or would know that in such case any child which might result from the intercourse would not be able to recover legal damages against the tortfeasor who caused her death.

No other state in the Union shares Louisiana's confidence in the efficacy of the means adopted by it to discourage the birth of children out of wedlock. Louisiana appears to be the only state which deprives an illegitimate child of the right to sue for the wrongful death of his mother. 72 A.L.R. 2d 1235, 1237 (1960); Speiser, *Recovery for Wrongful Death,* 589-590, n. 9 (1967). Empiric evidence supports the refusal of the other 49 states to follow the Louisiana pattern. The rate of illegitimacy in Louisiana (one out of nine live births) is substantially higher than the national average (one in fifteen).[4]

Particularly significant is a comparison of the illegitimacy rates in Louisiana with those in states employing more tolerant standards in determining the rights of children born out of wedlock. For about a half century now North Dakota and Arizona have had laws which in effect abolish illegitimacy.[5] Minnesota too is quite progressive

4. *Statistical Abstract of the United States,* 47-49 (1966); *Report of the Division of Public Health,* p. 21, Louisiana State Board of Health (1964).

5. "Every child is hereby declared to be the legitimate child of its natural parents and as such is entitled to support and education, to the same extent as if it had been born in lawful wedlock. It shall inherit from its natural parents and from their kindred heir lineal and collateral." 1917 Laws, *N.D.,* c. 70 §1; 1921 Laws, *Ariz.,* c. 114 §1. Oregon has a similar law. Ore., *Rev. Stat.* 109.060 (1963).

in its recognition of the legal rights of children born to unmarried parents.[6] The following table is taken from Vital Statistics of the United States (1965) Volume 1.

	Illegitimate Births	*All Births in State*
Louisiana	9,434	79,672
Minnesota	3,680	70,746
North Dakota	578	13,200

These figures show clearly that harsh illegitimacy laws have no evident effect on the deterrence of illegitimate births.

We recognize that ordinarily the courts cannot pass upon the wisdom of legislation and that decisions as to the relative efficacy of alternative approaches to a problem requiring legislative resolution must be left to the legislature. But, we submit, a more stringent test is required in the present case. Here the legislature has determined that the "general welfare" calls for the sacrifice of the welfare of defenseless little children. In such a situation, the Bill of Rights imposes upon the state the obligation to present some evidence that the sacrifice is in fact necessary and that it offers a reasonable prospect of efficacy in meeting the problem to which it is addressed. In the present case there is not the slightest evidence within or without the record to support such a conclusion.

(3) The oppressiveness of the means

Even legitimate ends cannot constitutionally be pursued by means which, though efficacious, are "unduly oppressive upon individuals." *Goldblatt* v. *Town of Hempstead,*

6. Minn., *Stat. Ann.* §257.23 (1959), 176.011 (Supp. 1964).

supra. It can hardly be doubted that in the present case the means selected by the State of Louisiana are unduly oppressive upon the orphaned children seeking to invoke the protection of the state's wrongful death statute.

In the first place, the victims of the state's exclusionary statute are already members of a greatly disadvantaged group. They were fatherless from birth, fatherless in circumstances which result in especial harm to them. As one psychiatrist expressed it, "To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." (Fodor, *Emotional Trauma Resulting From Illegitimate Birth,* 54 Archives of Neurology and Psychiatry 381 (1945) quoted in Krause, *Equal Protection for the Illegitimate,* 65 Mich. L. Rev. 477, 488 (1967).)

Besides being fatherless they are now motherless as well. They are now literally the children of no one.

They are almost certainly poor and quite probably destitute. It is a matter of common knowledge that illegitimacy is far more frequent among the poor than among the well-to-do. In the present case the decedent was a domestic who had to support five children out of her earnings and was required to resort to a charity hospital when she was stricken with the illness which proved fatal.

In his dissent in *Moore* v. *Dempsey,* 261 U. S. 86 (1923), Mr. Justice McReynolds stated (at p. 102) that "The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system." Nevertheless, the Court has

often recognized that, where a particularly disadvantaged group is involved, state action which ordinarily might be neutral and hence lawful may in the particular circumstances be oppressive and hence unconstitutional. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Bailey* v. *Alabama,* 219 U. S. 219 (1911).

In the second place, the means employed by Louisiana to effect its asserted legislative purpose (deterring illegitimacy) is unduly oppressive, because it deprives members of a class of legal aid which the state has recognized they sorely need. At common law, the children of a wage earner upon whom they depended for their own basic needs for survival had no cause of action against those who caused his death. Louisiana, like all the other states in the Union, recognized that under modern standards of a civilized society, this was an intolerable situation and rectified it by statutorily creating the wrongful death action. Dependent children who have one surviving parent need the benefits of such statutes; those who, like the children in the present case, have no surviving parent need them even more desperately, and it is therefore doubly oppressive that they should be deprived of them.

Finally, the means are oppressive because they constitute the punishing of the innocent for the wrongs of the guilty. In primitive times it was not uncommon to punish children for the iniquity of their parents; indeed, it was an aphorism that "The fathers have eaten a sour grape, and the children's teeth are set on edge" (*Jeremiah,* 31:29). But the Hebrew prophets aroused the conscience of society and established the principle that justice forbids the pun-

ishing of "the righteous with the wicked" (*Genesis*, 18:25) and demands that "every one shall die for his own iniquity" (*Jeremiah*, 31:30) and that "The son shall not bear the iniquity of the father" (*Ezekiel*, 18:20). This Biblical principle has become part of the law of the land of the United States, an aspect of "due process" which forbids guilt by association, so recently reaffirmed by this Court in *United States* v. *Robel*, 36 L.W. 4060, decided December 11, 1967. If due process forbids punishing a person who voluntarily, though innocently, associates with Communists, how much more so does it forbid punishing children for involuntarily associating with their unwed parents.

What the Louisiana exclusionary statute does is to punish the children not for what they have done but because of what they are. It penalizes not conduct but status. In invalidating a statute which made the "status" of drug addiction a criminal offense, this Court said (*Robinson* v. *California*, 370 U. S. 660, 666 (1962)):

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. * * *.

Yet, in practical effect what the State of Louisiana has done is to make it a punishable offense for a child to be illegitimate.

It is no answer to say that the purpose of the Louisiana exclusionary provision is not to punish illegitimate children but to prevent illegitimacy. The purpose of excluding members of the Communist party from employment in defense plants is not to punish Communist "dupes"—if it were,

they would be entitled to indictment, jury trial and all other procedural safeguards applicable to criminal proceedings—but to prevent breach of national security. The purpose of the non-Communist oath requirement of the Labor-Management Reporting and Disclosure Act is to protect the national economy by minimizing the danger of political strikes. Yet this Court held it to be an unconstitutional bill of attainder. *United States* v. *Brown*, 381 U. S. 437 (1965). If legislative exclusion of all members of the Communist class from the benefits of the Labor Relations Act constitutes an unconstitutional bill of attainder, analogous reasoning would require similar invalidation of the exclusion of children born out of wedlock from the benefit of wrongful death statutes, even though in both cases the purpose is not punitive but preventative.

The crux of the matter is that, whatever may have been the original social purpose of criminal law, its justification today is not that it seeks to avenge past wrongs but to deter future ones. But if punishment is a deterrent then the more cruel and unusual a punishment is, the more effective a deterrent it is likely to be; yet the Constitution forbids cruel and unusual punishments because they are unduly oppressive means to achieve the legitimate end. There is probably no more effective deterrent than the fear of harm to one's children; totalitarian governments, Nazi, fascist and Communist alike, recognize this and frequently make children hostages to insure good behavior on the part of their parents. It was a frequent practice too during the dynastic wars of England before our nation was established, as any reader of Shakespeare's historical dramas knows. Yet the fathers of our nation forbade "corruption of

blood" as a deterrent for even so heinous a crime as treason. U. S. Constitution, Article III, Section 3. Is not the effect of the exclusionary provision here in issue a "corruption of blood" and hence an unduly oppressive means to achieve even a legitimate end?

We note finally that the Louisiana exclusionary provision not only punishes the innocent but acquits the guilty. It would be less difficult to justify the exclusion if, as at common law, the proceeds of the wrongful death suit were to escheat to the state for the benefit of the general community. But that is not the situation in this case. Here, by the fortunate stroke that the parents of the children never participated in the traditional marriage ritual, the wrongdoing defendants suffer no penalty for their wrongdoing. The common law of negligence exonerates the tortfeasor if the victim too was culpable; but no rule of law has ever sanctioned the simultaneous punishment of the innocent and acquittal of the guilty. We doubt very much that the Constitution sanctions such a stultification of law.

C. Deprivation of Liberty

We have to this point treated the issue in this case as one involving the constitutionality of the deprivation of a property right, and have sought to establish that, because the victims of the deprivation are members of a "discrete and insular" minority, the asserted justification of the deprivation must be subjected to a more exacting judicial scrutiny than is accorded other laws alleged to have deprived persons of their property rights. Here we go further and suggest that more than property rights are involved in this case. The nature of the interest sought to be

vindicated by the plaintiffs in this suit is closer to liberty than it is to property. Accordingly, there is a double obligation to subject its deprivation to an exacting judicial scrutiny. It was not a First Amendment right which was involved in *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942), wherein Chief Justice Stone, citing footnote 4 in *United States* v. *Carolene Products Co., supra,* stated (at p. 544) that "There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned."

Professor Harry Krause, the author of the excellent article *Equal Protection for the Illegitimate* to which we have previously referred, states the point quite cogently (66 Mich. L. Rev. at 488):

> It would seem to be beyond question that a child's right to a familial relationship with his father is more akin to a "fundamental right and liberty" or a "basic civil right of man" than to a mere economic interest. Although money is involved, the illegitimate's claim goes much further, for it centers on his second-class status in our society—a society in which illegitimacy is a "psychic catastrophe" and in which recovery in tort is granted for a false allegation of illegitimacy. Indeed, the psychological effect of the stigma of bastardy upon its victim seems quite comparable to the damaging psychological effects upon the victims of racial discrimination, which effects were successfully exploited in the battle over school segregation. (Citations omitted.)

The liberty in *Skinner* v. *Oklahoma,* wherein this Court struck down a compulsory sterilization law, was the liberty of a mother to procreate. The liberty in the present case

is that of the procreated child to survive and be treated as a human being rather than a nothing. If the former is entitled to an exacting judicial scrutiny for its protection, so too is the latter.[7]

We believe that, measured by the standards applicable generally to property interests, Louisiana's exclusionary provision of its wrongful death statute would not meet the requirements of due process. Where the standards are those governing the deprivation of property rights of "discrete and insular minorities" this is doubly so. Where, we submit, involved is the deprivation of the liberty of members of "discrete and insular minorities" it is incontrovertibly so.

POINT II

Exclusion of children of an unmarried mother from the benefits of a wrongful death statute deprives them of equal protection of the laws.

We have urged in Point I that one of the reasons the Louisiana exclusionary provision constitutes a deprivation of both property and liberty without due process is that it is a particularly egregious or unjustifiable form of discrimination. We here argue that, even if it were less egregious and less unjustifiable, it would violate the mandate of equal protection imposed by the Fourteenth Amendment.

We submit that any discrimination in the treatment by government of individuals based solely on the marital status

7. That the relationship between the two statutes is close is indicated by the fact that efforts have been made in the Louisiana legislature to provide for compulsory sterilization of females having more than one illicit pregnancy. Article "Illegitimacy" in *Encyclopaedia of Social Sciences,* Rev. ed. 1968.

of the individual's parents at the time of the individual's birth constitutes an invidious discrimination prohibited by the equal protection clause of the Fourteenth Amendment. It may well be that such discrimination was not deemed unreasonable or invidious in 1868 when the Amendment was adopted but, as this Court said in *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663, 669 (1966):

> * * * the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See Malloy v. Hogan, 378 U. S. 1, 5-6. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. (Emphasis in original.)

The guarantee of the Equal Protection Clause is not met merely by a showing that all within a class are treated equally. In *McLaughlin* v. *Florida*, 379 U. S. 184, 190 (1964) this Court said (quoting from the earlier decision of *Gulf, C. & S.F.R. Co.* v. *Ellis*, 165 U. S. 150, 155 (1897)):

> Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such purpose." * * * "[A]rbitrary selection can never be justified by calling it classification."

After citing numerous cases in support of this position, the Court continued:

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal appli-

> cation among members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. * * *

As interpreted by the Louisiana courts, the statute here in issue is neither reasonable nor just in excluding children born out of wedlock from the benefit granted all other children of being able to sue for damages for the wrongful death of a parent.

The pattern of invidious discrimination suffered by the child born out of wedlock in our society is similar to the pattern of invidious discrimination suffered by the Negro. Both forms of prejudice pervade society and are motivated by complex combinations of historical, psychological and sociological factors. In addition, both forms of discrimination stem from a condition of birth in no way connected to the individual's capacities to achieve and in no way involving a choice made by the individual. The marital status of one's parents, like race, should be an utterly neutral factor in determining what benefits an individual receives. Discrimination based on the marital status of one's parents, like discrimination based on the color of one's parents, shocks the conscience because of its fundamentally irrational unfairness.

In *Loving* v. *Commonwealth of Virginia*, 87 S. Ct. 1817, 1823 (1967), in which this Court held that Virginia's anti-miscegenation laws violated the Equal Protection Clause, this Court said:

> Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their

> ancestry'' as being ''odious to a free people whose institutions are founded upon the doctrine of equality.'' *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

In *McLaughlin* v. *State of Florida, supra,* at 196, this Court set forth the test for constitutionality of statutes discriminating on the basis of race:

> Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.

In his concurring opinion, Mr. Justice Harlan framed the test as follows (at 197):

> I agree with the Court that the cohabitation statute has not been shown to be necessary to the integrity of the anti-marriage law, assumed *arguendo* to be valid, and that necessity, not mere reasonable relationship, is the proper test, * * *.

After citing several cases, he went on:

> The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment.

This same necessity test, we submit, should be required of statutes discriminating on the basis of legitimacy. Such a standard would articulate the kind of fundamental neutral principles of law which could guide our courts in applying

in a case-by-case method the guarantee of equal protection to the individual born out of wedlock in his relationship to society. Louisiana's wrongful death statute fails to meet that standard.

In both the case at bar and *McLaughlin*, the state's purpose in the challenged legislation was the prevention of promiscuousness and the preservation of the integrity of the marriage laws. The reasons for rejecting laws claiming to meet these purposes but requiring racial discrimination can be applied with equal force to laws discriminating on the basis of legitimacy of birth. As stated in *McLaughlin* (at 196):

> Those provisions of chapter 798 which are neutral as to race express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not. These provisions, if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State, including what is claimed to be a valid ban on interracial marriage. These same provisions, moreover, punish premarital sexual relations as severely or more severely in some instances than do those provisions which focus on the interracial couple. Florida has offered no argument that the State's policy against interracial marriage cannot be as adequately served by the general, neutral, and existing ban on illicit behavior as by a provision such as §798.15 which singles out the promiscuous interracial couple for special statutory treatment. In short, it has not been shown that §798.05 is a necessary adjunct to the State's ban on interracial marriage.

The holding in *Oyama* v. *State of California*, 332 U. S. 633 (1948) is directly on point. This Court there held that California's Alien Land Law violated the Equal Protection Clause in excluding from the benefits of certain California laws those children whose fathers were ineligible for citizenship. Under the Alien Land Law, the child of a father who was not permitted to hold land was confronted with the presumption that a conveyance financed by his father and recorded in his name was not a gift at all but that the land was being held in "something very akin to a resulting trust" (*ibid.* at 642). Failing to rebut the presumption resulted in the forfeiture of that land to the state. Fred Oyama, the citizen child, was denied equal protection of the law because (at 645):

> [w]hen, * * * [a] * * * Chinese or English father uses his own funds to buy land in his citizen son's name, an indefeasible title is presumed to vest in the boy; but when Kajiro Oyama [the father] arranges a similar transfer to Fred Oyama, the Alien Land Law interposes a presumption just to the contrary. Thus, as between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination; * * *

Fred Oyama was held to have been denied the equal protection of the law because the Court could not find sufficient justification in the legislative purpose of insuring that his father did not evade the prohibition on landholding to justify denying the former a right to which he would otherwise be entitled. The Court said (at 646-7):

> The only justification urged upon us by the State is that the discrimination is necessary to prevent evasion of the Alien Land Law's prohibition against the

> ownership of agricultural land by ineligible aliens. This reasoning presupposes the validity of that prohibition, a premise which we deem it unnecessary and therefore inappropriate to reexamine in this case. But assuming, for purposes of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it.

Only a showing of the strongest necessity can ever justify denying a significant right to one person on the ground that the conduct of another must be regulated. No such showing has been made in the present case.

The decision of November 8, 1967, of the three-judge court in *Smith, et al.* v. *King,* 36 L.W. 2301, decided November 8, 1967, now on appeal to this Court, is directly on point. The District Court held:

> It should be noted that there is no vested legal right for anyone to receive public financial assistance; neither the United States nor the Alabama Constitution requires Alabama to grant financial assistance to needy dependent children. However, once Alabama undertakes to provide a statutory program of assistance, it must do so in conformity with the constitutional mandate of equal protection. Alabama cannot pick and choose the mothers and children it will aid through the use of some classifications which are not rationally related to the purpose of the applicable statutes.

After citing cases, the court continued:

> The irrationality and the unreasonableness of the Alabama regulation is starkly revealed when it is realized that the regulation singles out from the Alabama needy dependent children a particular class who are illegitimate, or whose mothers engage in an illicit sexual rela-

> tionship, or who have an illegitimate child born in their family, and for one or more of these reasons renders ineligible those children otherwise eligible to receive financial benefits under the Aid to Dependent Children program. This "substitute father" gains his parental status under the Alabama regulation not by any act of fatherhood to the children and not by any support furnished, but merely by having sexual-relations with the mother.

The court then concluded that the substitute father regulation deprives those children of equal protection of the law because the substitute father regulation is "an arbitrary and discriminatory classification which results in the denial of financial benefits to needy children who are clearly eligible and entitled to receive such benefits * * * and that said children are denied for reasons unrelated to and in conflict with the purposes of these statutes."

The state sought to justify its "substitute father rule" on the ground that it was designed to discourage the continued "procreation of illegitimate children by persons who seem economically unable to care for them * * *" The court characterized this argument as utterly unrealistic, and noted that the issue before the court in no way concerned approval or disapproval of sexual promiscuity.

Conclusion

Louisiana's statutory purpose in providing for wrongful death actions is not met by excluding from its protection those who need it most. Nor are the public policies of encouraging marital stability, regularizing family life and discouraging promiscuity materially affected by the exclusion

of illegitimates from the benefits of the statute. The harsh burden imposed on the children in the present case cannot be justified by the assertion that their desperate predicament resulting from being denied the right to sue will stop others from producing babies out of wedlock. Nor can it be justified by any other test which meets the requirements of the Federal Constitution. In short, the decision of the Louisiana courts should be set aside and a mandate from this Court should issue requiring that the Levy children be treated in law as they are in fact—children.

Respectfully submitted,

LEO PFEFFER
Attorney for Executive Council of the Episcopal Church in the U. S. A., Amicus Curiae

HOWARD M. SQUADRON
JOSEPH B. ROBISON
Attorneys for American Jewish Congress, Amicus Curiae

LEO PFEFFER
LESTER GREENBERG
Of Counsel

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